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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-211

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,
Petitioner,

v.

NEWPORT TANKERS CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARVIN SCHWARTZ
BURTON M. EPSTEIN
243 Waverly Place
New York, New York 10014

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 10, 1978.

OPINION BELOW

The opinion of the Court of Appeals is reported at 575 F.2d 477, and reprinted in Appendix A (1a). The Decision and Order of the National Labor Relations

Board, including the Decision of the Administrative Law Judge, are not yet officially reported, but are reprinted in Appendix C (11a).

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on May 10, 1978. This Court's jurisdiction to review the judgment by writ of certiorari is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(b)(1)(B) of the National Labor Relations Act prohibits a union that represents licensed deck officers on ocean-going vessels (who are "supervisors" within the meaning of the Act) from engaging in "area standards" picketing to compel an employer to adhere to the minimum deck-officer manning standard which the union has negotiated with other employers, in the absence of any effort or intent by the union to influence or control the employer's decision as to who its deck officers would be.

2. Whether the court below, in reversing the decision of the NLRB, failed to accord to the Board's interpretation of the statute the degree of deference required by prior decisions of this Court.

STATUTES INVOLVED

Section 2 of the National Labor Relations Act, as amended, 29 U.S.C. § 152, provides in pertinent part as follows:

> "When used in this Act—
>
> * * * *

> "(3) The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor. . . .
>
> * * * *
>
> "(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
>
> * * * *
>
> "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

Section 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(B), provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *
>
> "(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . ."

Section 14(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 164(a), provides as follows:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining

a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

STATEMENT OF THE CASE

This is a case of a statute gone haywire. A provision which was enacted to prevent unions that represent rank-and-file employees from dictating to employers who their collective bargaining or grievance-adjusting representatives must be has undergone a bizarre mutation, and has been applied here to prohibit a union that represents supervisors from engaging in peaceful "area standards" picketing whose only purpose was to cause an employer to adhere to a manning standard for which the union had fought for many years. This result was reached despite the fact that the NLRB, whose interpretation of the statute is "entitled to the greatest deference in recognition of its special competence in dealing with labor problems," *American Broadcasting Companies, Inc.* v. *Writers Guild of America*, 98 S.Ct. 2423, 2436 (1978), held that the statute did not apply in this case and that the picketing here involved was lawful.

Background

The International Organization of Masters, Mates and Pilots (hereinafter referred to as MMP) has been since 1887 the principal union representing licensed deck officers (i.e., masters, mates and pilots) employed by the U.S. maritime industry. It is undisputed that such officers are "supervisors" within the meaning of the National Labor Relations Act.[1] MMP's membership also

[1] Although "supervisors" do not enjoy the statutory protections which are afforded to "employees" by the National Labor Relations Act, the Act does not prohibit them from forming or joining labor unions, bargaining collectively, or engaging in other concerted activities. In the maritime industry, collective bargaining by supervisors is a long-standing practice. Not only licensed deck officers but also licensed engineers, who are also supervisors, have for decades been organized into unions and covered by collective agreements.

includes a small number of nonsupervisory "employees" as defined in the Act (approximately 250, or three per cent of its total membership of approximately 8,500), principally deckhands or cooks on small vessels such as tugboats or ferries. MMP does not, however, either represent or seek to represent any "employees" on large ocean-going vessels of the type involved in this case. It represents only licensed deck officers on such vessels.

MMP bargains on an industrywide basis with over 100 shipping companies which operate approximately 300 ocean-going vessels. Its standard collective bargaining agreement provides, among other things, that the employers will maintain a minimum deck-officer complement of a master and four mates. In addition, the agreement contains detailed provisions relating to wages, fringe benefits, hours of work, vacations, holidays, job duties, living conditions aboard ship, and numerous other matters.

In recent years, the standards established by MMP's agreement—particularly the four-mate manning standard—have been under increasing attack, largely as a result of the activities of another union, the Marine Engineers Beneficial Association (MEBA). At one time, MEBA represented only licensed *engineers* on U.S. flag vessels. As employment in the industry has diminished, however, MEBA has sought to expand its scope by seeking contracts covering licensed deck officers as well as engineers. To induce employers to recognize and bargain with it rather than with MMP, MEBA offers the employers contracts which are more favorable to them. Among other differences, MEBA's contracts require only a master and *three* mates.

The interests of MMP and its members are seriously jeopardized *both* by MEBA's efforts to obtain contracts covering licensed deck officers *and* by the undercutting of MMP's manning standard. When MEBA obtains a contract covering licensed deck officers, it means that those jobs will go to MEBA members, and the job opportunities of MMP members are thereby reduced.[2] But when MEBA signs a contract calling for only a master and three mates, the interests of MMP are also affected in another way. A ship with only three mates has a substantial economic advantage over one with four mates. Thus, employers covered by the MMP contract, which requires four mates, are placed at a competitive disadvantage, and will inevitably bring pressure on MMP to relax its own contractual manning requirements. The evidence in this case showed that several shipping companies have already taken the position that, because of the competitive pressures resulting from ships under contract with MEBA, they will not enter into any contract with MMP unless MMP agrees to a deck officer complement of only three mates.

The preservation of the four-mate manning standard is of critical importance to MMP and its members. On ocean-going vessels, the work at sea is divided into three shifts, called "watches." Each watch is divided into two four-hour segments—i.e., the 12-4 watch is from mid-

[2] Collective bargaining agreements covering licensed deck officers (as well as those covering licensed engineers) are typically signed before a vessel is manned, and such agreements normally provide that the employer will hire only members of the signatory union. Such a provision is not unlawful under the Act, since the statutory prohibition against discrimination based on union membership, § 8(a)(3), 29 U.S.C. § 158(a)(3), applies only to "employees," and deck officers (as well as engineers) are "supervisors" within the meaning of the Act. Such "prehire" agreements have been a standard practice in this industry for decades. They provide the employer with a ready source of manpower in every port, and they provide the union members with continuing employment opportunities under standard union wages and working conditions.

night to 4:00 A.M. and noon to 4:00 P.M., the 4-8 watch is from 4:00 A.M. to 8:00 A.M. and 4:00 P.M. to 8:00 P.M., and the 8-12 watch is from 8:00 A.M. to noon and 8:00 P.M. to midnight. On four-mate vessels, these watches are divided between the second mate and two third mates. Each of these mates, while on watch, is required to be on the bridge and is responsible for the safe navigation of the vessel. The Chief Mate does not "stand watch," but is a "dayworker," working eight hours between 8:00 A.M. and 5:00 P.M.[3] He is responsible for cargo operations, maintenance of the ship, approving overtime for the crew, and performing a myriad of other duties as the second-in-command of the vessel. On three-mate vessels, on the other hand, the Chief Mate must stand an 8-hour watch on the bridge as well as performing the other duties assigned to him—cargo operations, maintenance, crew overtime, etc.

Under prior decisions of the Board, MMP is powerless to prevent an employer from entering into an agreement with MEBA and hiring MEBA deck officers. The Board has held that any picketing or other economic pressure by MMP that interferes with the employer's decision to enter into a collective bargaining agreement with MEBA and employ MEBA members as deck officers, or which seeks to compel the employer to replace the MEBA deck officers with MMP officers, violates Section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B), which prohibits a "labor organization" from attempting to "restrain or coerce . . . an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances . . . ." Since MMP is deemed to be a "labor organization" because of its few employee members, and since some deck officers have authority to adjust grievances which arise aboard ship, the Board

[3] The Captain also does not stand watch, but is in overall command of the ship.

has held that MMP is prohibited from attempting to force an employer to hire its members as deck officers.[4]

In the present case, an employer that had previously had a contract with MMP refused to renew that contract, and instead entered into a contract with MEBA. Since prior decisions had declared that picketing to force the employer to reverse that action would be prohibited, MMP, upon advice of its counsel, sought only to force the employer to employ four mates so as not to undercut the MMP manning standard. The achievement of that limited goal was important to MMP, for, as indicated above, it would stem the pressure from its own employers to reduce their manning to meet the competitive edge that the MEBA employers have with three-mate manning.

The Facts Which Gave Rise to the Present Case

This case involves the vessel S/T Achilles, which is owned by Newport Tankers Corporation. Prior to June 1975, Newport was a party to MMP's standard collective bargaiinng agreement and the deck officers employed on the Achilles were covered by that agreement. At that time, the Achilles had a deck officer complement of a master and *four* mates, as the standard agreement required.

In June 1975, when the MMP agreement expired, the Achilles was in dry dock and Newport refused to execute an extension or renewal of that agreement. Thereafter, in December 1975, Newport entered into an agreement

[4] See *International Organization of Masters, Mates & Pilots (Marine & Marketing Int'l Corp.)*, 197 N.L.R.B. 400 (1972), *enforced*, 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); *International Organization of Masters, Mates & Pilots (Westchester Marine Shipping Co.)*, 219 N.L.R.B. 26 (1975), *enforced* 539 F.2d 554 (5th Cir. 1976), *cert. denied*, 98 S.Ct. 106 (1977); *International Organization of Masters, Mates & Pilots (Cove Tankers Corp.)*, 224 N.L.R.B. 1626 (1976), *enforced*, 575 F.2d 896 (D.C. Cir. 1978).

with O.B.O. Ship Operators, Inc., under which O.B.O. undertook to "operate and manage" the vessel as "Agent" for Newport. O.B.O., in turn, entered into a collective bargaining agreement with MEBA, effective December 17, 1975, covering licensed deck officers as well as radio officers and engineers. Since that time, the vessel has employed only four licensed deck officers—a master and *three* mates.

In early 1976, MMP learned that the ship was again in operation, and that a Captain Fertig, known to MMP as a member of MEBA, was the master. Assuming that the vessel had entered into an agreement with MEBA, MMP initiated a proceeding against MEBA under Article XX of the AFL-CIO Constitution, which prohibits any AFL-CIO affiliate from interfering with the established bargaining relationship of any other affiliate. In the course of that proceeding, MEBA denied that it had a collective bargaining agreement covering the deck officers of the Achilles.

Thereafter, when the Achilles arrived at Norfolk, Virginia, MMP picketed the vessel with signs which read as follows:

> SS ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE SS ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.[5]

[5] Both before the Board and in the court below, the employer contended that the picket sign was "inaccurate" in stating that the

Newport then filed an unfair labor practice charge against MMP, alleging that this picketing violated Section 8(b)(1)(B) of the Act, and the General Counsel of the NLRB issued a complaint based on that charge. The complaint, as amended at the hearing, alleged that the picketing "restrained and coerced O.B.O. and Newport Tankers in the selection of its representatives for the purposes of collective bargaining and the adjustment of grievances *in that its object was to force O.B.O. to add to its complement of licensed deck officers an additional third mate.*" (emphasis added.) The complaint did not allege that MMP had attempted to force the replacement of any of the existing deck officers on the vessel. Indeed, the picket signs expressly stated that "we are not seeking the replacement of any persons employed aboard the SS Achilles."

The Decision of the NLRB

The case was heard by an Administrative Law Judge, who issued a decision holding the picketing to be unlawful under Section 8(b)(1)(B). The Board, however, reversed that decision and dismissed the complaint. The Board found that the sole objective of the picketing was to cause the employer to hire an additional third mate. Since MMP did not attempt either to force the replacement of any of the existing deck officers on the vessel or to force the employer to select any particular individual as the additional third mate, there was no violation of Section 8(b)(1)(B). "As is evident from the legislative history," the Board said, "Congress enacted Section 8(b)(1)(B) to protect an employer from a union which might seek to impose its will on the employer by dictating *whom* it should or should not select as its collective bargaining representative or grievance adjuster." (16a) "MMP's conduct herein does not diminish in any way the Employer's unfettered right to select the representative of its choice." (*Id.*)

second and third mates on the vessel were not covered by a collective bargaining agreement. As the Board noted, however, this inaccuracy was inadvertent, and was based on "MEBA's assertion at an AFL-CIO hearing that it had no collective bargaining agreement covering the deck officers on the ST Achilles." (13a, n.6.) In any event, the language of the picket sign is relevant only to the extent that it discloses the object of the picketing, and the Board found that the sole object of the picketing in this case "was to have the Employer hire an additional third mate." (14a).

The Decision of the Court of Appeals

The Court of Appeals reversed the Board, relying principally on the prior cases holding that Section 8(b)(1)(B) prohibits MMP from picketing a vessel for the purpose of forcing the employer to replace its MEBA deck officers with MMP deck officers. Although the court recognized that the object of the picketing in this case "was to require Newport to employ a second third mate, whether or not he was a member of MMP, but not to replace the existing third mate," the court concluded that this was a "distinction without a difference." (6a). The court's reasoning was as follows:

> "The objective of the statute is to proscribe restraint or coercion of an employer in the selection of his representatives for the purpose, *inter alia*, of the adjustment of grievances. There is, of course, a difference of degree in the restraint or coercion of an employer by picketing to accomplish the replacement of a given employee rather than to dilute the authority of that employee by requiring that at least some of his duties be performed by others. But aside from degree, we think that picketing to dilute the authority of an employee to adjust grievances is no less within the proscription of the statute." (*Id.*)

REASONS FOR GRANTING THE WRIT

I.

This case presents an important question under the National Labor Relations Act which has not been, but should be, settled by this Court. That question is whether Section 8(b)(1)(B) of the Act prohibits a union that represents supervisors from engaging in picketing or other concerted action to achieve what would for any other union be an entirely lawful collective bargaining objective—namely, the establishment or enforcement of a minimum manning standard. MMP has for decades sought and obtained provisions in its collective agreements requiring a minimum deck-officer complement of a master and four mates on every large ocean-going vessel. There are today several hundred U.S. flag vessels which, pursuant to such agreements, adhere to that standard. If the decision below is permitted to stand, MMP could no longer use peaceful economic pressure either to obtain such an agreement with any employer, or perhaps even to obtain the renewal of such an agreement upon its expiration.[6] The entire maritime industry, which has largely adhered to the four-mate standard, would be free to adopt three-mate manning. The result would be an enormous increase in unemployment among deck officers, and a substantial increase in the burdens on those who remain employed.

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[6] The decision below did not rely on the fact that the picketing in this case happened to be directed against an employer with which MMP no longer had a collective bargaining relationship. It is, of course, neither uncommon nor unlawful for a union to picket an employer to protest substandard wages or working conditions, even though the union neither has nor seeks a collective bargaining relationship with that employer. See *International Hod Carriers Union (Calumet Contractors Ass'n)*, 133 N.L.R.B. 512 (1961); *Houston Building Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962).

Nor is the decision below limited to the maritime industry. It could effectively preclude *any* union which represents supervisors in *any* industry from engaging in picketing or other concerted activities to establish or protect *any* minimum manning or employment standard.

There is no evidence that Congress ever intended any such result. Although the 1947 Taft-Hartley amendments excluded "supervisors" from the statutory definition of "employees"—thereby removing them from the affirmative protections of the Act—Congress did not prohibit supervisors from joining or forming unions, or engaging in collective bargaining, strikes, picketing, or other concerted activities. The Act has always been understood as embodying a *laissez faire* attitude toward union activity by supervisors, leaving "both foremen and employers to their economic weapons—the former to strikes and picketing to compel recognition, the latter to discriminatory discharges, espionage, and blacklists to combat efforts to organize." Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 Harv. L. Rev. 1, 5 (1947). "The result is that the collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the status quo ante the original NLRA." Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 Mich. L. Rev. 593, 600 (1948).

Section 8(b)(1)(B), the specific provision involved in this case, was not directed at concerted activities by supervisors at all, but was concerned with an entirely different problem. Its purpose was to prevent a union which represents an employer's rank-and-file "employees" from attempting to influence or control the employer's labor relations policies by influencing or controlling the selection of the personnel who make or implement such policies—i.e., the employer's collective-bargaining or grievance-adjusting representatives. As Senator Taft explained

at the time the legislation was being debated in the Senate:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." (93 Cong. Rec. 3837 (1947)).

See also S.Rep. No. 105, 80th Cong., 1st Sess. 21, 41 (1947); 93 Cong. Rec. 4143 (1947) (remarks of Senator Ellender); *Florida Power & Light Co.* v. *International B'hd of Elec. Workers*, 417 U.S. 790, 798-805 (1974).

The court below relied on three prior cases in which the Board and two courts of appeals have held that Section 8(b)(1)(B) prohibits MMP from picketing to force an employer to hire its members, rather than MEBA members, as deck officers, (See cases cited n. 4, p. 8, *supra.*) In those cases, despite the fact that MMP was not acting on behalf of rank-and-file employees nor seeking to influence the employer's collective bargaining or grievance-adjusting policies, its conduct was deemed to be within the literal prohibition of the statute. But see *International Organization of Masters, Mates & Pilots*,

486 F.2d 1271, 1276 (D.C.Cir. 1973) (dissenting opinion of Judge Bazelon). MMP believes that those cases were wrongly decided, but they are in any event wholly inapposite here. In this case, MMP's conduct was *not* within the reach *either* of the statutory purpose *or* its literal language. MMP was not seeking to cause the displacement of any deck officers or to dictate whom the employer must hire as deck officers. As the Board stated:

> "MMP's conduct herein does not diminish in any way the Employer's unfettered right to select the representative of its choice. While concededly the Employer might be forced to hire an additional third mate, the choice as to who that third mate shall be is totally within its discretion and control." (16a).

Thus the Board, although adhering to its prior decisions, found the conduct in this case to be lawful.

The court of appeals thought that the employment of *any* additional deck officer would "dilute" the grievance-adjusting authority of the other officers, and that "picketing to dilute the authority of an employee to adjust grievances is no less within the proscription of the statute." (6a).[7] There was, however, no evidence that any such "dilution" would occur. MMP did not insist that any additional mate hired by the employer be

[7] The court's concept of "dilution" of grievance-adjusting responsibility was derived from *Laborers' Local 478 (International Builders of Florida, Inc.)*, 204 N.L.R.B. 357 (1973), *enforced*, 503 F.2d 192 (D.C. Cir. 1974). In that case, a union struck to force an employer to reinstate a former supervisor (Davis) who had been demoted. The union considered another foreman who had been retained (Wilson) to be racially biased, and wanted Davis to be reinstated either in place of Wilson or as an intermediary between Wilson and the employees. The strike in *Laborers* was thus aimed at "diluting" the authority of Wilson. Nothing of the kind, however, was involved in the present case. MMP did not desire to "dilute" anyone's authority; it merely wanted the employer to employ four mates in order to prevent erosion of MMP's manning standard.

given grievance-adjusting authority; the employer, if it desired, could have hired an additional mate without giving him such authority. Moreover, as the Board pointed out:

> [E]ven if we were to assume that an employer's sole representative may have his or her authority diluted if that employer were forced to hire an additional representative, it would not constitute an interference with the employer's selection of either its "sole or additional representative" inasmuch as the employer would still have absolute control over whom it selects. As previously stated, the legislative history of the Act clearly shows that, in enacting Sec. 8(b)(1)(B), Congress sought to prevent unions from telling an employer that it must select this or that person as its representative or that it must select its representative from a group or category of persons. (17a, n.10)

This Court has emphasized that Section 8(b) is not to be construed as prohibiting peaceful picketing unless it is absolutely clear, not only from the language of the statute but from its legislative history, that such a prohibition was intended by Congress. Thus, in *NLRB* v. *Drivers' Local 639*, 362 U.S. 274, 284 (1960), the Court said:

> "In the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing. Therefore, unless there is the clearest indication in the legislative history of § 8(b)(1)(A) supporting the Board's claim of power under that section, we cannot sustain the Board's power here."

The Court reiterated this same principle in *NLRB* v. *Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 62-63 (1964), noting that "[b]oth the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing

might collide with the guarantee of the First Amendment."

The "isolated evil" at which Section 8(b)(1)(B) is directed is "union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." *Florida Power & Light Co.* v. *International B'hd of Elec. Workers, supra*, 417 U.S. at 803. In this case, MMP did not seek to dictate "who" the employer must hire as its deck officers, but merely how many such deck officers there would be. The sole purpose of the picketing was to maintain the four-mate manning standard for which MMP had fought for many years. We believe that such conduct is not within the statutory prohibition, but in any event, the question is of sufficient importance to warrant review by this Court.

II.

Review is warranted in this case not only because of the importance of the substantive question presented, but also because of the court of appeals' failure to follow this Court's directives as to the deference owed to the Board's interpretation of the Act. In two recent cases, this Court has made clear that where two or more interpretations of the Act are possible, a court of appeals must accept the Board's interpretation, even if the court might prefer a different result. Thus, in *NLRB* v. *Local 103, Int'l Ass'n of Bridge Workers*, 98 S.Ct. 651, 656, 660 (1978), the Court stated:

> We have concluded that the Board's construction of the Act, although perhaps not the only tenable one, is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections. [footnote omitted]
>
> * * * *
>
> The Board's resolution of the conflicting claims in this case represents a defensible construction of the

> statute and is entitled to considerable deference. Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." [citations omitted]

The Court reiterated and applied this same principle in *American Broadcasting Companies, Inc.* v. *Writers Guild of America*, 98 S. Ct. 2423, 2435 (1978), a case which, like the present one, involved an issue as to the meaning and application of Section 8(b)(1)(B).

In this case, as in the cases cited above, the Board's interpretation is certainly a "defensible construction of the statute."[8] Yet the court below gave no weight whatever to the Board's interpretation; it approached the matter as if it were an original question, and adopted its own interpretation of the statute.

Even if it is assumed that the Board's interpretation is "not the only tenable one"—and we believe it is—the court had an obligation to accept that interpretation as "a reasonable implementation of the purposes" of the Act. Its failure to do so reflects a fundamental misunderstanding of the scope of judicial review of decisions of the Board. This matter in itself is of sufficient importance to warrant review and correction by this Court.

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[8] It should be noted that the Board has consistently taken an expansionist view of Section 8(b)(1)(B), pushing its boundary ever outward. See *Florida Power and Light Co.* v. *International B'hd of Elec. Workers*, 417 U.S. 790 (1974). In *American Broadcasting, supra*, this Court upheld the Board's most recent broad interpretation of the scope of that section by the narrowest 5-4 margin. Yet even the Board, in the instant case, declined to extend the statute to reach the kind of peaceful "area standards" picketing involved here.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARVIN SCHWARTZ
BURTON M. EPSTEIN
243 Waverly Place
New York, New York 10014

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Petitioner

August 1978

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2425

NEWPORT TANKERS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,
Intervenor.

COVE SHIPPING, INC., POINT SHIPPING CORP., CALIFORNIA AND HAWAIIAN SUGAR CO., PACIFIC-GULF MARINE, INC. AND ZAPATA BULK TRANSPORT, INC.,
Amicus Curiae.

On Petition for Review of an Order of the
National Labor Relations Board

Argued March 6, 1978 Decided May 10, 1978

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and WIDENER, Circuit Judge.

WINTER, Circuit Judge:

Notwithstanding the contrary view of the administrative law judge, a majority of the Board in a split decision ruled that International Organization of Masters, Mates and Pilots (MMP) did not violate § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B), when it picketed the S/T Achilles to require her operators, Newport Tankers Corporation (Newport), to employ an additional third mate. The Board therefore dismissed the complaint against MMP. On Newport's petition for review, we conclude that § 8(b)(1)(B) was violated. We therefore set aside the Board's order and remand the case to the Board for further proceedings.

I.

On April 13, 1976, the S/T Achilles docked in Chesapeake, Virginia for the purpose of loading grain for shipment to the Soviet Union. The ship's licensed deck officers and engineers were members of the Marine Engineers Beneficial Association (MEBA), while its unlicensed seamen belonged to the Seafarers International Union (SIU). It is undisputed that the second and third mates of the ship were vested with the authority to adjust grievances as part of their usual duties and that, on the specific orders of the ship's master, they exercised this authority. Indeed, the collective bargaining agreement between Newport and SIU, covering unlicensed seamen, specifically provided that grievances were to be presented "to their superior officers," among which were, of course, the second and third mates.

On April 14, the S/T Achilles was picketed by members of the Offshore Division of MMP.[1] In pertinent part, the picket signs stated that:

> S/S [sic] ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLEC-

[1] The Offshore Division is the largest organizational component of MMP and is comprised solely of shipboard supervisory personnel.

> TIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATE ARE EMPLOYED UNDER SUBSTANDARD WORKING CONDITIONS.

MMP concedes that the first sentence was erroneous, for, at the time of picketing, the Achilles' deck officers were represented by MEBA. As to the second sentence, MMP further concedes that the only "substandard" condition to which the signs referred was the condition of having to work without an additional third mate.[2] MMP's alleged purpose in picketing S/T Achilles was to force Newport to employ one additional third mate (irrespective of union membership) so as not to undercut the manning standard generally prevailing on ships manned by MMP deck officers.

As a result of the picketing, employees at the grain elevator from which the grain was to be loaded refused to load grain aboard the Achilles. Picketing continued until April 16, when it was enjoined by a United States district court in an admiralty trespass proceeding. On May 3, an injunction was entered in district court, prohibiting MMP from engaging in further picketing of the S/T Achilles pending resolution of the instant unfair labor practice charge.

In filing the charge, the general counsel contended that MMP's picketing violated § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B),[3]

[2] The standard contract between ship operators and MEBA provides for a complement of a master, a first mate, a second mate and *one* third mate. The standard contract between ship operators and MMP, on the other hand, provides for *two* third mates.

[3] In pertinent part, this section provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . .

because a third mate is a grievance adjustor and picketing to *require* the employment of a second third mate necessarily interferes with an operator's selection of its representatives for the purpose of adjustment of grieveances.

The administrative law judge, relying upon prior decisions of the Board which had examined the organizational structure of MMP, concluded that MMP was a "labor organization" within the meaning of the Act,[4] and that the picketing about which complaint was made violated § 8(b)(1)(B) because picketing to cause the hiring of an *additional* licensed deck officer interfered with Newport's right freely to designate its supervisors. The administrative law judge rejected the distinction pressed upon him that the hiring of an *additional* licensed deck officer, unlike picketing to accomplish the *replacement* of existing officers, was not proscribed by § 8(b)(1)(B). A majority of the Board reached a contrary conclusion. The majority held that since the object of the picketing was to have Newport hire an *additional* third mate of its own choosing, whether or not a member of MMP, and not to replace a third mate previously chosen, the picketing was not in violation of the Act. International Organization of Masters, Mates and Pilots (Newport Tankers Corporation), 233 N.L.R.B. No. 42 (November 7, 1977).

II.

Since the late 1950's, MMP and MEBA have been engaged in vigorous competition to represent licensed deck officers on American merchant vessels. From the stand-

[4] Although MMP's principal membership is licensed deck officers employed by the U.S. maritime industry, it has approximately 250 "employee" members—that is, cooks and deckhands on small inland vessels. MMP, an intervenor in the proceedings before us, does not contest that it is a "labor organization" within the meaning of the Act.

point of most ship operators, MEBA has the competitive advantage because of several contract provisions (including the decreased manning standard) which favor operators. As MEBA has become increasingly successful in its representational efforts, MMP has resorted to picketing ships whose operators have signed contracts with MEBA.

Since 1972, the District of Columbia Circuit and the Fifth Circuit have held in three separate cases that MMP's picketing activities in this regard were in violation of § 8(b)(1)(B). *See* International Organization of Masters, Mates & Pilots v. N.L.R.B. [Marine & Marketing Int'l], 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 956 (1974); International Organization of Masters, Mates & Pilots v. N.L.R.B. [Westchester Marine Shipping], 539 F.2d 554 (5 Cir. 1976), *cert. denied*, —— U.S. —— (October 3, 1977); International Organization of Masters, Mates & Pilots v. N.L.R.B. [Cove Tankers], —— F.2d —— (D.C. Cir. 1978). In each of these cases, MMP picketed vessels manned by MEBA deck officers for the purpose of having these deck officers *replaced* by MMP members. In each the basis of decision, briefly stated, was that MMP, because it has members who are "employees" within the meaning of the Act, is a "labor organization" for purposes of § 8(b)(1)(B). Deck officers are supervisors who, in their daily activities, represent the employer in adjusting grievances of unlicensed seamen. As a consequence, when MMP, a statutory "labor organization," pickets MEBA-manned vessels for the purpose of persuading employers to select MMP deck officers, it comes within the literal prohibition of § 8(b)(1)(B).[5]

[5] *Marine and Marketing Int'l*, the first of these cases, was a split decision. Chief Judge Bazelon dissented from enforcement of the Board's order. In essence, his theory was that a union principally of supervisors is not a "labor organization" for purposes of § 8(b)(1)(B), even though it has some employee members, when it pickets an employer to affect the employer's choice of its supervisory per-

The instant case differs from cited cases only in the purpose of the picketing. Here the objective was to require Newport to employ a second third mate, whether or not he was a member of MMP, but not to replace the existing third mate. We agree with the administrative law judge that the distinction between the picketing here and that in the previously decided cases is a distinction without a difference. The objective of the statute is to proscribe restraint or coercion of an employer in the selection of his representatives for the purpose, *inter alia*, of the adjustment of grievances. There is, of course, a difference of degree in the restraint or coercion of an employer by picketing to accomplish the replacement of a given employee rather than to dilute the authority of that employee by requiring that at least some of his duties be performed by others. But aside from degree, we think that picketing to dilute the authority of an employee to adjust grievances is no less within the proscription of the statute.

The correctness of the conclusion we reach seems to have been recognized in Laborers International Union of North America, Local 478 (International Builders of Florida, Inc.), 204 N.L.R.B. 357, *enforced*, 503 F.2d 192 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). There the picketing was to require the employer to hire a certain Davis as an assistant foreman in lieu of or

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sonnel where none of the union's employee members are employees of the employer so picketed. 486 F.2d at 1276-79. While Judge Bazelon's theory seemingly has some support in the legislative history of § 8(b)(1)(B), *see* Florida Power & Light v. Electrical Workers, 417 U.S. 790, 803-05 (1974), it has not been advanced by either the intervenor MMP or any of the other parties to this appeal. We therefore do not consider it. For the purpose of deciding this case, we assume the correctness of the conclusion reached by the majority in *Marine and Marketing Int'l* and the unanimous courts in *Westchester Marine Shipping* and *Cove Tankers*, and decide whether the picketing which occurred here also fell within the literal application of § 8(b)(1)(B).

under a certain Wilson who was foreman. In holding the picketing violated § 8(b)(1)(B), the Board said, "we are in agreement . . . that [the union] by insisting that Davis be hired as foreman, *either in Wilson's place or under Wilson*, violated . . . the Act." 204 N.L.R.B. at ——. (Emphasis added.) We therefore cannot read *Laborers Int'l*, as did the majority of the Board, as resting solely upon the union's attempt to require the employment of a particular individual, i.e. Davis. But even if it is so read, we agree with the dissenting member of the Board in the instant case who said that one cannot read *Marine and Marketing*, *Westchester Marine*, and *Cove Tankers* and not recognize the "fact of life" that the actual object of MMP's picketing was the eventual replacement of the ship's deck officers with MMP members.[6]

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[6] This same conclusion was reached in the Fifth Circuit's decision in *Westchester Marine Shipping, supra*. In *Westchester*, the Board had not only ordered the cessation of picketing for replacement of MEBA personnel but also (in stark contrast to its position in the instant case) picketing for other objectives, including increased manning. In enforcing this broad order, the court made the following observations:

> For Westchester and Pyramid to have met MM&P labor standards, particularly the manning requirement in the standard MM&P contract, would have necessitated a breach of the then-effective collective bargaining contract between the employers and MEBA. Recognition of MM&P by the employers and execution of an appropriate collective bargaining agreement between those employers and MM&P would similarly have forced a breach of the existing contract. The Board asserts that MM&P's attainment of any or all of the sought-after objectives of its picketing would have compelled MEBA to forbid its members from serving on the Ultramar or the Sugar Islander, and we have no difficulty accepting this assertion. Maintaining its competitive edge in the fight to represent licensed deck officers on ocean-going vessels turns largely on the ability of MEBA to offer employers an economical contract, which will in turn permit effective competition between United States and foreign flag vessels. Consequently, even if

For these reasons, the order of the Board vacating dismissal of the complaint must be set aside. Under applicable law as we have declared it, the picketing by MMP was in violation of § 8(b)(1)(B), and we therefore remand the case to the Board for further proceedings in accordance with this opinion.

VACATED AND REMANDED.

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the only objective in fact attained were adherence to MM&P labor standards, the threat to MEBA would still be clear.

539 F.2d at 561.

It is clear to us, as it obviously was to the Fifth Circuit, that MMP's ultimate objective is to supplant MEBA. Whether the immediate picketing objective is wholesale replacement of existing personnel or a more subtle attempt to force the employer into a breach of the existing contract with MEBA, the ultimate effect is equally coercive of Newport's right to select its grievance adjusters.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2425

[Filed May 10, 1978]

NEWPORT TANKERS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,
Intervenor.

COVE SHIPPING, INC., POINT SHIPPING CORP., CALIFORNIA AND HAWAIIAN SUGAR CO., PACIFIC-GULF MARINE, INC., AND ZAPATA BULK TRANSPORT, INC.,
Amicus Curiae.

On Petition for Review of an Order of the National Labor Relations Board

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THIS CAUSE came on to be heard upon the petition of Newport Tankers Corporation for review of an order issued against it by the National Labor Relations Board on November 4, 1977, in proceedings before the said Board known upon its records as Case No. 5-CB-1973; and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the National Labor Relations Board be, and it is hereby vacated and the case is remanded to the Board for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 5-CB-1973

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS

and

NEWPORT TANKERS CORPORATION

DECISION AND ORDER

On February 15, 1977, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and District 2, Marine Engineers Beneficial Association-Associated Maritime Officers (MEBA), the Intervenor herein, filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.[1]

[1] The Respondent's request for oral argument is hereby denied as the record and briefs adequately present the issues and positions of the parties.

The Administrative Law Judge found that the Respondent, International Organization of Masters, Mates and Pilots (herein called MMP), violated Section 8(b)(1)(B) of the Act when it picketed the Employer, Newport Tankers Corporation, to force it to hire an additional third mate to its complement of deck officers. These officers are represented by the Intervenor, District 2, Marine Engineers Beneficial Association-Associated Maritime Officers (MEBA). He did not find, as was alleged by the General Counsel, that MMP's real purpose in picketing was to force the Employer to replace its MEBA-represented officers with officers represented by MMP, although he noted that the Board, in prior decisions involving MMP, found that MMP had engaged in picketing for such object.[2] Instead, the Administrative Law Judge, relying on *Laborers' International Union of North America, AFL-CIO, Local 478 (International Builders of Florida, Inc.)*,[3] found that there is no real distinction between picketing to force the hiring of an additional third mate and picketing to seek the replacement of all deck officers. He concluded therefore that MMP's conduct violated Section 8(b)(1)(B) of the Act. For the reasons stated below, we disagree with the Administrative Law Judge's conclusion.[4]

The relevant facts, briefly stated, are as follows: On December 22, 1975, the Employer entered into an agency agreement with O.B.O. Ship Operators, Inc. (herein called O.B.O.), in which the latter was to manage and operate the ST *Achilles*, a vessel owned by the Employer. Subsequently, O.B.O. signed a collective-bargaining agreement with MEBA under which MEBA was to provide

[2] See ALJD, fn. 2.

[3] 204 NLRB 357 (1973), (Member Jenkins dissenting), enfd. 503 F.2d 192 (C.A.D.C., 1974).

[4] In light of our finding herein, we find it unnecessary to pass on the other issues raised by the Respondent.

the licensed deck officers for the ST *Achilles*. Under the manning provisions of the MEBA agreement, the Employer was to maintain no fewer than four licensed officers, consisting of a master, chief mate, second mate, and a third mate.

On February 13, 1976, the ST *Achilles* was chartered to carry grain from the United States to the Soviet Union and on April 13, 1976, the vessel docked in Chesapeake, Virginia, for the purpose of loading the grain. On April 14, MMP[5] picketed the vessel with picket signs that read:

> S/S [sic] ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD WORKING CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS ABOARD THE S/S [sic] ANCHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.[6]

The manning provisions under a standard MMP contract provide that an employer shall maintain no fewer than five deck officers consisting of a master, chief mate, second mate, and two third mates. Accordingly, MMP

[5] The Offshore Division is the largest division of MMP and is comprised solely of licensed deck officers, all of whom are supervisors within the meaning of Sec. 2(11) of the Act.

[6] While the picket signs inaccurately stated that the second and third mates were not covered by a collective-bargaining agreement, it should be noted that these statements were made in reliance on MEBA's assertion at an AFL-CIO hearing that it had no collective-bargaining agreement covering the deck officers on the ST *Achilles*.

argues that it sought merely to enforce area labor standards by requiring the Employer to add another third mate to its complement of deck officers. It argues that the selection of the third mate is to be in the Employer's sole discretion. While, as previously stated, the General Counsel would have us find that MMP's true motive in picketing was to force the Employer into replacing the officers represented by MEBA with officers represented by it, we find insufficient evidence in the record to support a finding that MMP's motive was other than that printed on the picket signs. Indeed, the General Counsel relies not on the evidence in the record, but on prior Board decisions to support his contention. Thus, in the absence of such evidence, we find that the object of Respondent's picketing was to have the Employer hire an additional third mate. The sole issue to be decided then is whether picketing for this limited purpose is prohibited by Section 8(b)(1)(B).

As already indicated, the Administrative Law Judge found Respondent's picketing to be violative of Section 8(b)(1)(B), relying on the Board's decision in *Laborers' International*, *supra*, to support his findings. We find that case factually distinguishable.

Thus, in *Laborers' International* the Board found that the union (MMP) violated Section 8(b)(1)(B) of the Act when it picketed an employer to force it to retain a named foreman (Davis) in place of, or under, another named foreman (Wilson). We held there that the right to strike or engage in concerted activity does not include the right to dictate to an employer to select a particular supervisor who would have the power to adjust grievances. Similarly, in *Operating Engineers, Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO (Redi-Mix Products, Inc. d/b/a Visalia Redi-Mix)*,[7] the Board upheld the Administrative Law Judge's

[7] 219 NLRB 531 (1975).

finding that the union there violated Section 8(b)(1)(B) when it tried to coerce the employer, through picketing, to rehire the latter's collective-bargaining representative and grievance adjuster, Leonard Hill.

As is clear from a reading of *Laborers' International* and *Operating Engineers*, the illegal activity in those cases consisted of attempts by a union to force an employer into selecting or replacing a particular identified individual as its collective-bargaining representative or grievance adjuster. Such conduct is clearly proscribed by Section 8(b)(1)(B). The present case, on the other hand, differs substantially from these two cases in that the record shows only that MMP seeks to add to the Employer's complement of officers, with the actual selection of such officers left entirely to the Employer's discretion. In our review, Section 8(b)(1)(B) does not prohibit this type of conduct nor do we feel that Congress, in enacting this provision, intended to prohibit picketing for such a purpose.

The legislative history of the Act, while not specifically addressing itself to the particular issue involved here, does provide some evidence that Congress, in enacting Section 8(b)(1)(B), sought only to prevent unions from interfering with an employer's selection of a particular representative. The Senate Labor Committee, in reporting the bill in which Section 8(b)(1)(B) originated, explained "this subsection would not permit a union to dictate *who* [emphasis supplied] shall represent an employer in the settlement of employee grievances."[8] An example of the type of activity forbidden was offered by Senator Taft when he stated that:

> [B]ut employees cannot say to their employer, "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." . . . It would prevent their

[8] S. Rept. 105, 80th Cong., 1st sess, p. 21, I Leg. Hist. 427 (1947).

> saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not . . . work." . . . Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally." [9]

As is evident from the legislative history, Congress enacted Section 8(b)(1)(B) to protect an employer from a union which might seek to impose its will on the employer by dictating *whom* it should or should not select as its collective-bargaining representative or grievance adjuster.

MMP's conduct herein does not diminish in any way the Employer's unfettered right to select the representative of its choice. While concededly the Employer might be forced to hire an additional third mate, the choice as to who that third mate shall be is totally within its discretion and control. There is nothing in the record evidence to indicate that MMP sought to have one of its own members selected as the additional third mate. Indeed, in light of the Employer's current collective-bargaining agreement with MEBA covering all deck officers, we doubt that the Employer could have selected another third mate from among MMP's members or that MMP realistically expected the Employer to do so.

In view of the foregoing, we find that Respondent's conduct herein has not been shown to have restrained or coerced the Employer in the selection of its collective-bargaining representative or grievance adjuster. Accordingly, we shall dismiss the complaint in its entirety.[10]

[9] 93 Cong. Rec. 3953, II Leg. Hist. 1012 (1947).

[10] We are unpersuaded by our dissenting colleague's rather strained interpretation of Sec. 8(b)(1)(B) of the Act. His view that Sec. 8(b)(1)(B) of the Act prohibits picketing by a union to force an employer simply to hire an additional though unnamed collective-bargaining representative or grievance adjuster is supported neither by the legislative history of the Act nor by Board or court precedent. Indeed, even if we were to assume that an employer's sole representative may have his or her authority diluted if that employer were forced to hire an additional representative, it would not constitute an interference with the employer's selection of either its "sole or additional representative" inasmuch as the employer would still have absolute control over whom it selects. As previously stated, the legislative history of the Act clearly shows that, in enacting Sec. 8(b)(1)(B), Congress sought to prevent unions from telling an employer that it must select this or that person as its representative or that it must select its representative from a particular group or category of persons. Having considered our dissenting colleague's position in this matter and finding no logical basis for his position, we ahere to our decision herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.[11]

[11] Chairman Fanning would also dismiss the complaint on the additional ground that the evidence fails to establish that third mates are authorized as collective-bargaining representatives or grievance adjusters on behalf of the Employer. He does so for the reasons stated in his dissenting opinions in *Local 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Company)*, 192 NLRB 77 (1971), enfd. 486 F.2d 602 (C.A. 7, 1973), vacated and remanded 418 U.S. 902 (1974); *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company)*, 192 NLRB 85 (1971), reversed 487 F.2d 1143 (C.A.D.C., 1973); *Florida Power and Light Company*, 193 NLRB 30 (1971), reversed 487 F.2d 1143 (C.A.D.C., 1973), affd. 417 U.S. 790 (1974), and subsequent cases.

Dated, Washington, D.C. November 4, 1977

JOHN H. FANNING, Chairman

BETTY SOUTHARD MURPHY, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER PENELLO, dissenting:

The majority decision in this case ignores the plain terms and obvious intention of Section 8(b)(1)(B), misconceives its legislative history, and disregards the reality of the jurisdictional conflict between Respondent and Intervenor as revealed in past Board cases and in the record. I, therefore, would not dismiss the complaint, which alleges that Respondent violated Section 8(b)(1)(B) by picketing the Company's vessel at dock admittedly to compel the addition of another officer to the ship's complement. Moreover, I would find that Respondent's true objective was not its admitted purpose, but rather the replacement of the ship's officers, who were represented by Intervenor, with its own members.

Some brief background is necessary to an understanding of the legal issues presented. Respondent International Organization of Masters, Mates and Pilots (IOMMP or MMP), and Intervenor Marine Engineers Beneficial Association Associated Maritime Officers (MEBA-AMO or MEBA), have been engaged in a jurisdictional dispute for some years. MMP has traditionally represented licensed deck officers (seagoing supervisory personnel) aboard United States merchant ships. Particularly after 1970, MEBA, which had principally represented only licensed engineers on such vessels, began to negotiate collective-bargaining agreements covering licensed deck officers as well as engineers. MMP responded to this challenge from MEBA by picketing ships whose deck officers were subject to MEBA labor contracts. In cases decided in 1972, 1975, and 1976,[12] the Board found that

[12] *International Organization of Masters, Mates and Pilots, International Marine Division, ILA-AFL-CIO (Marine and Marketing International Corporation)*, 197 NLRB 400 (1972), enfd. 486 F.2d 1271 (C.A.D.C., 1973), cert. denied 416 U.S. 956 (1974); *International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO (Westchester*

MMP violated 8(b)(1)(B) by picketing ships with an object of forcing the employers to replace their MEBA-represented captains and mates, who adjusted grievances, with officers belonging to MMP.

Having been found guilty of violating Section 8(b)(1)(B) in the foregoing cases by picketing to cause replacement of ships' officers, MMP assertedly decided to change its tack in the instant situation. Consequently, on April 14, 1976, MMP erected a picket line near the dock of the S/T *Achilles*, a merchant vessel whose officers were covered by a MEBA contract. The picket signs stated:

> S/S [sic] ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD WORKING CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE S/S [sic] ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.

Dock workers represented by the International Longshoremen's Association honored the picket line and refused to load grain on the ship until injunctions were obtained some days later. MMP contends that the sole object of this picketing was to force the operator of the ship to hire an additional third mate of its own choosing, thereby increasing the number of officers on board

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Marine Shipping Co., Inc.), 219 NLRB 26 (1975), enfd. 539 F.2d 554 (C.A. 5, 1976); *International Organization of Masters, Mates and Pilots, AFL-CIO (Cove Tankers Corporation)*, 224 NLRB 1626 (1976).

from four to five. Five officers is the minimum number required in the manning provision of MMP's Master Collective Bargaining Agreement. In other words, MMP argues that it was only seeking to preserve "area standards" relating to manning by picketing the S/T *Achilles*.

Though, for reasons which will be explained below, I cannot credit Respondent's assertion that the aim of its picketing was merely the addition of another deck officer to the ship's company, I would nevertheless find a violation based upon its stated goal.

The majority takes the position that MMP did not violate Section 8(b)(1)(B), because it did not seek to dictate to the employer *whom* it should select as the extra officer: "While concededly the Employer might be forced to hire an additional third mate, the choice as to who that third mate shall be is totally within its discretion and control." My colleagues say that legislative history shows that Congress intended only to prohibit unions from restraining or coercing employers in the selection or replacement of a particular identified individual or group as an 8(b)(1)(B) representative, and did not mean to prevent unions from pressuring employers in connection with deciding how many such representatives there should be. They also argue that Board case law is consistent with this reading of the statute.

I am unable to follow the tortured reasoning which leads the members of the majority to their conclusion. Section 8(b)(1)(B) prohibits a union from using restraint or coercion against an employer in the selection of his collective-bargaining representatives or grievance adjusters. An employer's selection of his 8(b)(1)(B) representatives, however, cannot be artifically subdivided into selection of a particular individual or group, which the statute is said to protect, as opposed to the number of such representatives, which is asserted to be left sub-

ject to union pressure. For the right to designate a particular individual as a grievance adjuster or collective-bargaining representative carries with it the implicit authority to confine the exercise of 8(b)(1)(B) responsibilities to that person. As an example, an employer may have chosen a certain individual to handle grievance matters for him, because of the employer's confidence in his ability, experience, and trustworthiness, and may, for that reason, desire that this person, and only this person, adjust grievances. Yet, under the majority view, the employer could be forced by a union to increase the number of individuals performing this task, thus insuring that responsibility for adjustment of grievances would be divided among several people and diluting the authority of the person whom the employer would prefer to handle all his grievances.

That this is the unmistakable meaning of today's Decision is illustrated by the majority's discussion of *Laborers' International Union of North America, AFL-CIO, Local 478 (International Builders of Florida, Inc.)*.[13] In that case, the Board found that a union violated Section 8(b)(1)(B) by restraining and coercing the employer with an object of forcing him to hire one Davis as foreman instead of, *or under*, one Wilson (emphasis supplied). The employees objected to Wilson, according to the Administrative Law Judge, because, "he stood over them and required them to keep working more than [they] liked." [14] The majority distinguishes this case from the instant one on the ground that the union in *Laborers' International* was seeking the selection of a "particular identified individual" as, at least, an additional 8(b)(1)(B) representative. Therefore, had the union in *Laborers' International* sought only the addition of an

[13] 204 NLRB 357 (1973), enfd. 503 F.2d 192 (C.A.D.C., 1974).

[14] 204 NLRB at 363.

unnamed foreman in an effort to diminish Wilson's authority, the majority would have presumably found no violation.

Yet, the majority asserts that Congress did not intend to forbid such conduct. My colleagues quote from remarks made by Senator Taft to exemplify what type of activity, in their view, Congress sought to proscribe by Section 8(b)(1)(B): "It would prevent [employees] saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not . . . work.' " [15] Again, however, under the majority's construction of Section 8(b)(1)(B), a union which did not like Foreman Jones, although it could not legally seek his replacement, could restrain or coerce the employer into hiring one or more additional foremen, albeit unnamed, in order to reduce Foreman Jones' power by spreading it among more people. Also, it is unlikely that an employer brought under such pressure would not choose to add individuals more satisfactory to the union. I do not believe that Congress intended that the statute be so narrowly limited as to allow a union to pursue a practice nearly as useful to it as forcing the employer to select a different 8(b)(1)(B) representative altogether.

In any event, I am convinced that the actual object of MMP's picketing was the replacement of the ship's officers with MMP members. In this connection, it is impossible to disregard the Board's findings of violations based upon such an object in *Marine and Marketing*, *Westchester Marine*, and *Cove Tankers*. Indeed, as the Board stated in *Cove*,

> It is not possible to read the prior cases arising out of the rivalry between the IOMMP and AMO-MEBA, and the evidence in this case, without comprehending that an essential element of that rivalry is a

[15] 93 Cong. Rec. 3953, II Leg. Hist. 1012 (1947).

battle over jobs—a battle to determine whether the ships involved shall be manned by members of IOMMP dispatched from its hiring halls or by AMO-MEBA members from that union's hiring halls.[16]

Today, however, the members of the majority have chosen to ignore this fact of life relating to these two unions which the Board so clearly recognized only last year.

Past cases aside, the record in this proceeding discloses that MMP's purpose in picketing went beyond the addition of another officer to the S/T *Achilles*' complement. Thus, the picket signs stated that the second and third mates were not covered by a collective-bargaining agreement, although they were indisputably subject to an MEBA labor contract at the time. Even more importantly, it was revealed at the hearing that MMP itself had negotiated collective-bargaining contracts providing for four, rather than five, deck officers, thus violating its own so-called area standards, and convincingly refuting its assertion that preserving such standards was the goal of the picketing herein.

In short, therefore, I would find that Respondent MMP unlawfully picketed the S/T *Achilles*, whether the object of the picketing was replacement of the ship's officers, as I believe it to have been, or merely the addition of another mate aboard the vessel.

Dated, Washington, D.C. November 4, 1977

JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

[16] 224 NLRB at 1635.

JD-100-77
Norfolk, VA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 5-CB-1973

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS

and

NEWPORT TANKERS CORPORATION

Bruce D. Rosenstein, Esq., Baltimore, MD, for the General Counsel.

Warren M. Davison, Esq., Baltimore, MD, for the Charging Party.

Richard H. Markowitz, Esq., New York, NY, for the Intervenor.

Marvin Schwartz, Esq., New York, NY, for the Respondent.

DECISION

Statement of the Case

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed April 16, 1976, by Newport Tankers Corporation, against International Organization of Masters, Mates and Pilots, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a Complaint dated April 22, 1976, alleging violations by the Respondent of Section 8(b)(1)(B) and Section 2(6) and(7) of the National Labor Relations Act, as amended, herein

called the Act. Respondent, by its Answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Norfolk, Virginia on June 2, 1976. All parties[1] were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, I make the following:

Findings of Fact

I. Jurisdiction

Newport Tankers Corporation, a Delaware corporation which maintains its principle office and place of business in New York, New York, is engaged in the shipping industry. It owns and operates oceangoing vessels including the S/T Achilles, the vessel involved herein. During the 12-month period preceding the issuance of the Complaint, a representative period, Newport Tankers Corporation received revenues in excess of $50,000 for transporting goods and materials in interstate and foreign commerce. I find that Newport Tankers Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

As previously found by the Board,[2] and as fully supported by the record evidence in this case, I find that

[1] District 2, Marine Engineers Beneficial Association-Associated Maritime Officers, herein also called MEBA, was permitted to intervene in this proceeding on the basis of its current collective bargaining agreement with O.B.O. Ship Operators, Inc., covering the licensed deck officers aboard the S/T Achilles.

[2] *International Organization of Masters, Mates and Pilots, AFL-CIO (Cove Tankers Corporation)*, 224 NLRB No. 206; *International*

Respondent, International Organization of Masters, Mates and Pilots, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background*

In previous cases (see fn. 2), the Board found, *inter alia*, that this Respondent violated Section 8(b)(1)(B) of the Act by picketing vessels with an object of causing the owners and/or operators of such vessels to replace its supervisory licensed deck officers, represented by MEBA, with licensed deck officers who are members of Respondent. In the instant case, it is alleged that Respondent picketed the S/T Achilles with an object of forcing Newport Tankers Corporation and O.B.O. Ship Operators, Inc. "to add to its complement of licensed deck officers an additional third mate." Alternatively, the General Counsel contends that an object of the picketing was to cause the replacement of MEBA represented licensed deck officers by licensed deck officers represented by Respondent. Respondent concedes that an object of its picketing was to cause the hiring of an additional third mate, and asserts that this was a lawful object. It denies the alleged "replacement" objective. In addition, Respondent asserts that the picketing of the Achilles was the sole responsibility of its Offshore Division, which, it claims, is not a labor organization. Finally, Respondent contends that the 8(b)(1)(B) allegation must fail because the additional third mate which it sought to cause the employer to

Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Lines), 220 NLRB No. 52; *International Organization of Masters, Mates and Pilots, etc. (Westchester Marine Shipping Co., Inc., et al)*, 219 NLRB 26; *International Organization of Masters, Mates and Pilots, etc. (Marine and Marketing International Corporation)* 197 NLRB 400, enf'd. 486 F.2d 1271 (D.C. Cir. 1973), *cert. den.* 416 U.S. 956 (1974).

hire "would not have had grievance adjusting authority" within the meaning of that section of the Act.

B. *Facts*

On December 22, 1975, Newport Tankers Corporation entered into an agreement with O.B.O. Ship Operator, Inc. by which the latter was appointed ". . . exclusive agent to manage, operate and conduct the business of . . ." the S/T Achilles, an American Flag vessel owned by Newport Tankers Corporation. That agreement further provides that the agent is to "Obtain suitable Master, Officers and crew personnel for the vessel."

The Achilles was thereafter staffed with 42 individuals. The 10 licensed officers, including the Master, the Chief Mate, the Second Mate, the Third Mate, the Radio Officer and the five engineers, are members of MEBA, and are covered by a collective bargaining agreement between that organization and O.B.O. Ship Operators, Inc. The 32 unlicensed individuals, represented by the Seafarers International Union, are also covered by a current collective bargaining contract.

On February 13, 1976, the Achilles was chartered to carry grain from the United States to the Soviet Union. Thereafter, on April 13, 1976, the vessel docked in Chesapeake, Virginia, at a berth owned and operated by Cargill, Inc., to prepare for the receipt of grain from Cargill's grain elevator. However, on the following day, Respondent picketed the vessel, near the dock, with signs stating:

> SS ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD WORKING CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY

> PERSONS EMPLOYED ABOARD THE SS ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS.

As a result of the picketing, employees of Cargill, Inc., who are represented by the International Longshoremen's Association, refused to load grain aboard the Achilles.

Picketing continued until April 16, when it was enjoined by United States District Court Judge J. Calvitt Clarke in an admiralty trespass proceeding brought by Cargill, Inc. On April 23, 1976, upon application of the Regional Director for Region 5, United States District Court Judge John A. MacKenzie issued a temporary restraining order against further picketing. Thereafter, on May 3, pursuant to Section 10(j) of the Act, Judge MacKenzie issued a temporary injunction, restraining Respondent from picketing the S/T Achilles in the vicinity of the Cargill dock, pending resolution of the matter before the Board.

As noted, Respondent concedes that an object of its picketing was to cause the Employer and its operating agent" to add to its complement of licensed deck officers an additional third mate," [3] but contends, *inter alia*, that such individuals do not possess grievance adjustment authority. However, according to the uncontradicted testimony of Captain Arthur Fertig, the Master of the Achilles, as corroborated by the testimony of David

[3] Respondent's then current Master Collective Bargaining Agreement contains a manning provision requiring a minimum licensed deck officer complement of a Master and four mates (Chief Mate, Second Mate and two Third Mates), as opposed to the Master and three mates required by the contract between MEBA and O.B.O. Ship Operators, Inc. However, Respondent itself has signed contracts requiring a complement of a Master and three mates.

Weigel, the third mate aboard the vessel, Fertig has specifically authorized and empowered all licensed deck officers to adjust the grievances of unlicensed personnel aboard the vessel. Indeed, according to Fertig, when a deck officer is on "watch," he is in command of the vessel, and is expected to resolve any problems or grievances that arise or occur during the course of his watch. The third mate, who is the "watch officer" for some 8 hours each day, has, during his first 45 days aboard the vessel, resolved such grievances. Thus, when an unlicensed seaman objected to a tank-cleaning assignment, the matter was raised by the seaman and his union delegate, and was resolved by the third mate. This was accomplished in accordance with Article II, Section 2(a) of the collective bargaining agreement covering unlicensed seamen, which states:

> "One man in each department shall be elected by the Unlicensed Seamen in that department to act as Departmental Delegate. Such Delegates shall, together with the Permanent Ship's Committee members, keep track of all conditions and problems and grievances in their respective departments, and present to their superior officers, on behalf of the Unlicensed Seamen in their Departments, all facts, opinions and circumstances concerning any matter which may require adjustment or improvement."

Respondent's Offshore Division, which conducted the picketing of the Achilles, is composed of some 6,000 members, all of whom work as licensed deck officers and, concededly, are statutory supervisors. The approximately 250 unlicensed, non-supervisory employees included in Respondent's membership, belong to its Inland Division. Under Respondent's constitution, the International President, Executive Vice-President, and Secretary-Treasurer, who are elected in a union-wide election, automatically become the executive officer, assistant executive officer, and contract enforcement and chief fiscal officer, respectively, of each of its five divisions. While other officers are

elected by the division membership, a number of persons are officials of both the Offshore Division and the Inland Division. The Offshore Division has its own by-laws and treasury, collects dues and has its own negotiating committee which prepares contract demands, negotiates contracts and calls strikes. However, under Respondent's constitution, collective bargaining agreements "must be made in the name of the International Organization of Masters, Mates and Pilots," after express approval of such agreements by the International President.

C. *Conclusions*

Respondent contends that picketing of the S/T Achilles was the sole responsibility of its Offshore Division which it asserts, is not a "labor organization" since it does not represent "employees" or admit them to membership. However, in prior cases,[4] the Board has examined the structural relationship existing between Respondent and its Offshore Division, and concluded that the Offshore Division is an integral part of Respondent and, in circumstances similar to those in the present case, acts as an arm or agent of Respondent in attempting to enforce the terms of Respondent's Master Collective Bargaining Agreement. Indeed, the degree of control over the Offshore Division's affairs which is reserved to Respondent by its constitution, has led the Board to conclude, in *Seatrain*, that ". . . the interrelationship between MM&P, International and its various divisions, or subordinate bodies, is such that MM&P, together with its constituent organizations, constitute a labor organization with the meaning of the Act." Accordingly, I conclude that the Respondent is legally responsible for the picketing activities complained of herein.

I further conclude, based on the terms of the collective bargaining agreement covering the unlicensed seamen, and the uncontradicted testimony of Fertig and Weigel,

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[4] See e.g. *International Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Lines, Inc.)*, 220 NLRB No. 52.

that the licensed deck officers aboard the S/T Achilles, including the third mate, have grievance adjusting authority and functions with respect to the unlicensed, nonsupervisory personnel aboard that vessel. Moreover, those officers are conceded statutory supervisors and, thus, even in the absence of evidence of grievance adjusting authority, I would conclude that they are "employer representatives" within the meaning of Section 8(b)(1)(B). For, the Board has held that:

> "All persons who are 'supervisors' within the meaning of Section 2(11) of the Act are employers' representatives for the purposes of collective bargaining or the adjustment of grievances within the purview of Section 8(b)(1)(B) of the Act.[5]

Section 8(b)(1)(B) of the Act provides that "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." It is settled law that a labor organization violates that provision by applying restraint and coercion, in the form of strikes and/or picketing, with an object of forcing an employer to select unwanted representatives or to forego representation by representatives of his own choosing.

As indicated, the Board has repeatedly found that this Respondent has violated Section 8(b)(1)(B) by picketing vessels with an object of forcing their employer-owners to replace the licensed deck officers, who are members of MEBA, with licensed deck officers who are members of Respondent. In so doing, Respondent sought to obtain recognition as sole collective bargaining rep-

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[5] *Operating Engineers, Local No. 501 (Anheuser Busch, Inc.)*, 199 NLRB 551; See also *Carpenters, Local 14 (Max M. Kaplan Properties)* 217 NLRB No. 13.

resentative of such officers, and to impose its own terms and conditions of employment on the licensed deck officers.

That, in the instant case, Respondent assertedly sought to cause the hiring of an *additional* licensed deck officer, rather than the *replacement* of existing officers, seems, to me, a distinction without real meaning. In either case, the employer is restrained in his right freely to designate his representatives. The right to select representatives, and to secure their loyalty, free from coercion by a labor organization, cannot logically extend only to the identity of the individuals, and not to their number. In *Laborers' International Union of North America, Local 478 (International Builders of Florida, Inc.)*,[6] the Board similarly concluded, holding:

> "We are in agreement with the Administrative Law Judge that Respondent, by insisting that Davis be hired as foreman, *either in Wilson's place or under Wilson*, violated Section 8(b)(1)(B) of the Act." (emphasis added)

Accordingly, I conclude that Respondent, by picketing the S/T Achilles, with an object of forcing or requiring Newport Tankers Corporation and O.B.O. Ship Operators, Inc. to conform to the manning provisions of Respondent's Master Agreement by the addition to their complement of licensed deck officers of an additional third mate, has violated Section 8(b)(1)(B) of the Act.[7]

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[6] 204 NLRB 357, enf'd. 503, F.2d 192 (D.C. Cir. 1974).

[7] In view of my decision herein, I need not pass upon the General Counsel's alternative contention that an object of Respondent's picketing was to secure the replacement of the licensed deck officers, represented by MEBA, by licensed deck officers represented by Respondent. I note, however, that such an object is indicated by: (1) Respondent's conduct in past cases; (2) the fact that its picket signs in this matter untruthfully stated that the Second and Third Mates were not covered by a collective bargaining agreement; and (3) the fact that Respondent has itself negotiated contracts re-

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with the operations of the Employer described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(b)(1)(B) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In view of Respondent's demonstrated proclivity to engage in conduct violative of Section 8(b)(1)(B), I shall recommend an order which is broad in scope.

Conclusions of Law

1. International Organization of Masters, Mates and Pilots is a labor organization within the meaning of Section 2(5) of the Act.

2. Newport Tankers Corporation is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

3. By its picketing activities, as found hereinabove, Respondent, International Organization of Masters,

---

quiring licensed deck officer complements of a Master and three mates. These factors indicate that Respondent's picketing objectives would have been only partially satisfied by the addition of another third mate.

Mates and Pilots, has engaged in unfair labor practices in violation of Section 8(b)(1)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By its picketing activities, as found hereinabove, Respondent, International Organization of Masters, Mates and Pilots, has engaged in unfair labor practices in violation of Section 8(b)(1)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[8]

ORDER

Respondent, International Organization of Masters, Mates and Pilots, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Picketing the S/T Achilles, or any other vessel owned or operated by any employer, with an object of causing Newport Tankers Corporation, O.B.O. Ship Operators, Inc., or any other employer engaged in commerce, or in an industry affecting commerce, to add to, or replace, their complement of supervisory licensed deck

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[8] In the event no exceptions are filed, as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

officers or any other supervisors within the meaning of the Act.

(b) In any other manner, restraining or coercing any employer engaged in commerce, or in an industry affecting commerce, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at all its business offices and meeting halls in the United States (including the offices and meeting halls of its Offshore Division) copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Furnish the Regional Director for Region 5 with signed copies of the aforesaid Notice for posting by Newport Tankers Corporation and O.B.O. Ship Operators, Inc., if willing, at places where they customarily post notices to their employees.

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[9] In the event that this Order is enforced by a Judgment of a United States court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR BOARD."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

/s/ Irwin H. Socoloff
IRWIN H. SOCOLOFF
Administrative Law Judge

FORM NLRB—4726 (4-71) JD-100-77

APPENDIX

[SEAL] NOTICE TO MEMBERS [SEAL]
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT picket the S/T Achilles, or any other vessel owned or operated by any employer, with an object of causing Newport Tankers Corporation, O.B.O. Ship Operators, Inc., or any other employer engaged in commerce, or in an industry affecting commerce, to add to, or replace, their complement of supervisory licensed deck officers or any other supervisors within the meaning of the Act.

WE WILL NOT, in any other manner, restrain or coerce any employer engaged in commerce, or in an industry affecting commerce, in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS
(Labor Organization)

Dated _____ By _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Bldg., Room 1019, Hopkins Plaza, Baltimore, Maryland 21201, Telephone No. (301) 922-2772.

Supreme Court, U. S.
FILED
OCT 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-211

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS,

Petitioner,

v.

NEWPORT TANKERS CORPORATION

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR NEWPORT TANKERS CORPORATION IN OPPOSITION

EARLE K. SHAWE,
WARREN M. DAVISON,
LESLIE R. STELLMAN,
SHAWE & ROSENTHAL,
Sun Life Building,
Charles Center,
Baltimore, Maryland 21201,
(301) 752-1040,
Counsel for Respondent Newport Tankers Corporation.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

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NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR NEWPORT TANKERS CORPORATION IN OPPOSITION

Respondent Newport Tankers Corporation opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 575 F.2d 477 (Pet. App. 1a-8a). The Decision and Order of the National Labor Relations Board, including the

Decision of the Administrative Law Judge, are reported at 233 NLRB No. 42 (Pet. App. 11a-37a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1978 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on August 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The time for filing this Opposition has been extended by this Court.

QUESTION PRESENTED

Whether, in the circumstances of this case, the Court of Appeals properly concluded that the Petitioner (hereafter, "MMP" or "Union") restrained and coerced Newport Tankers Corporation in the selection of its representatives for the purposes of the adjustment of grievances by picketing its ship in order to force it to hire an additional third mate.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, *as amended* (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are set forth at Pet. 2-4.

STATEMENT OF THE CASE

A. The Board's Findings of Fact

The Board's findings of fact, which were adopted by the Court of Appeals, are not disputed by the Petitioner herein. They may be summarized as follows:

This case is the most recent in a series of incidents arising out of a rivalry between the MMP and Marine Engineers Beneficial Association (hereafter, "MEBA")

regarding the representation of licensed deck officers aboard American flag vessels.[1]

Newport Tankers Corporation is the owner of the S/T *Achilles,* an American flag vessel that, in 1976, was under charter to transport grain from the United States to the Soviet Union (Pet. App. 2a). Newport's agents, OBO Ship Operators, Inc., operated the S/T *Achilles* and had a collective bargaining agreement with MEBA covering the ship's licensed deck officers (Pet. App. 2a).[2]

On the evening of April 13, 1976, the *Achilles* docked in Chesapeake, Virginia at a berth owned and operated by Cargill, Inc., for the purpose of loading grain for shipment from Cargill's grain elevator (Pet. App. 2a). The next morning, before loading could begin, MMP picketed at the dock near the vessel, the picket signs stating:

> S.S. ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT.
>
> THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUBSTANDARD CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE S.S. ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY.
>
> OFF SHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS (Pet. App. 2a-3a).

[1] See, *e.g., International Organization of MMP (Westchester Marine Shipping Co., Inc.),* 219 NLRB 26 (1975), *enforcement granted,* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 98 S. Ct. 106 (1977); *International Organization of MMP (Marine and Marketing International Corp.),* 197 NLRB 400 (1972), *enforcement granted,* 486 F.2d 1271 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 956 (1974); *International Organization of MMP (Cove Tankers Corporation),* 224 NLRB 1676 (1976), *enforcement granted,* 575 F.2d 896 (D.C. Cir. 896) (1978).

[2] The unlicensed crew were represented by the Seafarers International Union (Pet. App. 2a).

As a result of the picketing, Cargill's employees, who are represented by the International Longshoremen's Association, refused to load the ship until after an injunction had been obtained in the United States District Court following the filing of the instant unfair labor practice charge (Pet. App. 3a).

Both the Board and the Court concluded that the second and third mates of the S/T *Achilles* are vested with the authority to, and do in fact, adjust grievances as part of their usual duties and on the specific orders of the ship's master, Captain Arthur Fertig (Pet. App. 32a). The Petitioner does not here seek review of that determination.[3]

In most, but by no means all, of its contracts MMP provides for a licensed deck complement of two third mates as well as a master, a first mate and a second mate.[4] In contrast, MEBA offers employers contracts which are more favoable to them, requiring only a master and *three* mates (Pet. 5).

Thus, it is undisputed that an object of the picketing carried on by MMP was to eliminate MEBA's competitive advantage by forcing the employer to increase its complement of deck officers by the hiring of an additional third mate (Pet. 9-10).

[3] Nor does the Petitioner here seek review of the Board and Court's determinations that it is in fact a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act. See, *e.g., International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 122 U.S. App. D.C. 74, 80, 351 F.2d 771, 777 (1965).

[4] Petitioner's assertion that "[i]ts standard collective bargaining agreement provides . . . that the employers will maintain a minimum deck-officer complement of a master and four mates" (Pet. 5; see also Pet. 12), omits the fact that it is not MMP's universal practice to require two third mates. To the contrary, MMP has a number of contracts providing for manning identical to MEBA's, *i.e.*, a master and *three* mates (Pet. 24a, 33a-34a, n.7).

B. The Decisions Below

1. *The Board's Conclusions and Order*

The Administrative Law Judge who heard this case found that MMP's picketing violated Section 8(b)(1)(B) of the Act because it had as an object to force Newport to hire an additional third mate to its complement of licensed deck officers, thus restraining and coercing Newport in the selection of its representatives for the adjustment of grievances. The Judge recommended that MMP cease and desist from such conduct and that it post an appropriate notice.

The Board panel, by a two-to-one vote, reversed the Judge and dismissed the complaint. In the majority's view, the fact that MMP was seeking to force Newport to add another third mate to its complement of licensed deck officers, did not constitute restraint or coercion within the purview of Section 8(b)(1)(B). Dissenting Member Penello would have affirmed the Judge and would have found a violation of Section 8(b)(1)(B).

2. *The Decision of the Court of Appeals*

The Court of Appeals vacated the Board's Order and determined that "the picketing by MMP was in violation of § 8(b)(1)(A)" (Pet. App. 8a). Relying upon the rationale applied by both the Administrative Law Judge and the dissenting Board member, the Court properly concluded:

> [T]he distinction between the picketing here and that in the previously decided cases is a distinction without a difference. The objective of the statute is to proscribe restraint or coercion of an employer in the selection of his representatives for the purpose, *inter alia*, of the adjustment of grievances. There is, of course, a difference of degree in the restraint or coercion of an employer by picketing to accomplish the replacement of a given employee rather than to dilute the authority of that employee by requiring that at least some of his duties be performed by others. But aside from degree, we think that

> picketing to dilute the authority of an employee to adjust grievances is no less within the proscription of the statute (Pet. App. 6a).

Thus, the Court rejected the contention that the picketing fell outside the purview of Section 8(b)(1)(B) because it was not carried out with an object of forcing the employer to *replace* the existing third mate, or to designate a *specific individual* to perform grievance-adjusting functions (Pet. App. 6a-7a). Tracing the earlier case history of the protracted dispute between MMP and MEBA over jobs,[5] the Court recognized the "'fact of life' that the actual object of MMP's picketing was the eventual replacement of the ship's deck officers with MMP members" (Pet. App. 7a).

ARGUMENT

I.

The history of the dispute between MMP and MEBA relating to the representation of licensed deck officers on American flag ships, dates back to the late 1950's, with both unions seeking to represent this group of officers. As the Court of Appeals for the Fifth Circuit noted in *International Organization of Masters, Mates and Pilots v. N.L.R.B., supra,* 539 F.2d at 556-557:

> Since the late 1950's, MM&P has been engaged in a burgeoning jurisdictional dispute with MEBA over the right to represent licensed deck officers manning United States merchant vessels. Representation of the licensed deck officers who will serve upon a particular vessel by either MM&P or MEBA, as the case may be, is determined when the vessel's operators execute a contract with the union of their choice at or near the time when construction of the vessel is completed. The competition between the two unions has heightened since 1970 because of renewed shipbuilding activity fostered in principal part by a federal subsidy program.

[5] See cases cited at n.1, *supra.*

> Because its contract is more favorable to vessel operators in many respects than the standard MM&P contract, MEBA holds a substantial competitive advantage in the fight to represent licensed deck officers on the newest generation of United States merchant vessels. MM&P's contract, for example, requires manning by a master and four mates; the MEBA contract, by contrast, only requires manning by a master and three mates. Additionally, there is a wage differential favoring the MEBA contract, and an alliance between MEBA and the Seafarers International Union, which represents unlicensed personnel, has worked in the past as an inducement for vessel operators to accept the MEBA contract.

The case at bar is merely another battle in the jurisdictional war between MMP and MEBA. As the cases show, each battle has been fought on somewhat different grounds, with MMP changing its tactics to meet the adverse findings of prior cases, but not changing its ultimate goal to win back from MEBA representation of the masters and mates of American flag ships, first by direct action and, failing that, by indirection as in this case.

Significantly, in every previous case that has addressed this dispute, the Board has found that MMP's conduct violated Section 8(b)(1)(B) of the Act, the Courts of Appeals have affirmed, and this Court has consistently denied review of those decisions.

For example, in *International Organization of MMP (Marine and Marketing International Corp.),* 197 NLRB 400 (1972), *enf'd.* 486 F.2d 1271 (D.C. Cir., 1973), *cert. denied* 416 U.S. 956 (1974), MMP picketed a vessel with the object of forcing its owners to replace the MEBA-represented masters and mates with licensed deck officers represented by MMP. The Board concluded that this picketing violated Section 8(b)(1)(B) of the Act because: (1) the master and the first, second and third

mates all had grievance-adjustment responsibilities as part of their duties; (2) the picketing constituted restraint and coercion; and (3) the object of the picketing — the replacement of the MEBA-represented officers by MMP-represented officers — fell within the purview of Section 8(b)(1)(B) of the Act (197 NLRB at 402-403). The Court of Appeals for the District of Columbia Circuit (Judge Bazelon dissenting) granted enforcement of the Board's order, upholding the Company's "right to be free from coercion in the selection of grievance adjusters. * * * The Company has an interest in being free from coercion from labor organizations in the selection of grievance adjusters, no matter what its reasons for choosing one union over the other." 486 F.2d at 1275.

The following year, both the Board and the Court of Appeals for the Fifth Circuit ruled that picketing by MMP to force the operators of two new ships to agree to operate under the terms of the standard MMP contract and to replace the MEBA-represented deck officers chosen by the ships' operators with deck officers represented by MMP, was violative of Section 8(b)(1)(B). *International Organization of MMP (Westchester Marine Shipping Co., Inc.),* 219 NLRB 26 (1975), *enf'd.* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 98 S. Ct. 106 (1977). In enforcing the Board's order in *Westchester Marine,* the Fifth Circuit rejected MMP's contention — a contention which is repeated in the instant Petition (Pet. 17) — that its sole object was to force the ships to meet MMP's manning requirements:

> For [the ship operators] to have met MM&P labor standards, particularly the manning requirement in the standard MM&P contract, would have necessitated a breach of the then-effective collective bargaining contract between the employers and MEBA. Recognition of MM&P by the employers and execution of an appropriate collective bargaining agreement between those employers and MM&P would similarly have forced a breach of the existing contract. The Board asserts that MM&P's attainment of any or all of the sought-after objectives of its picketing would have compelled MEBA to forbid its members from serving on the Ultramar or the Sugar Islander, and we have no difficulty accepting this assertion. Maintaining its competitive edge in the fight to represent licensed deck officers on ocean-going vessels turns largely on the ability of MEBA to offer employers an economical contract, which will in turn permit effective competition between United States and foreign flag vessels. Consequently, even if the only objective in fact attained were adherence to MM&P labor standards, the threat to MEBA would still be clear. The threat to MEBA raised by recognition and a collective bargaining agreement between the employers and MM&P is, of course, even more substantial. The probable and foreseeable result of MM&P's picketing for any or all the objects discussed above would be, we feel, unnecessary restriction of the class of individuals available as licensed deck officers to members of MM&P and no others. Picketing for each of these objects violated Section 8(b)(1)(B).

539 F.2d at 561.

MMP's next attempt at achieving its clearly recognizable goal of compelling the replacement of MEBA crews with its own members met the same fate in *International Organization of MMP (Cove Tankers Corporation),* 224 NLRB 1626 (1976), *enf'd.* 575 F.2d 896 (D.C. Cir., 1978). In *Cove Tankers,* as in the instant case, MMP picketed a ship manned by MEBA members, with signs directed at the vessel's allegedly "substandard manning." 575 F.2d at 902. The Court of Appeals for the District of Columbia Circuit unanimously[6] affirmed the Board's finding that the Union's conduct was "directed toward (1) replacement of the MEBA officers with MMP

[6] Judge Bazelon, who had dissented from the majority opinion in *Marine Marketing, supra,* joined in the Court's opinion in *Cove Tankers.*

members, (2) recognition of MMP by Cove [and] (3) adoption of the standard-form MMP collective bargaining agreement by Cove." 575 F.2d at 902.

The facts which give rise to the instant case are merely another chapter in what the Board characterized in *Cove Tankers* as a "battle over jobs" between MMP and MEBA. The Court below properly recognized MMP's conduct for what it was, and, agreeing with the dissenting Board member, determined that the picketing of the S/T *Achilles* was carried out with the same proscribed objectives as those found in *Marine Marketing, Westchester Marine* and *Cove Tankers, supra* (Pet. App. 5a-7a).

II.

The Petitioner contends that "Section 8(b)(1)(B) . . . was not directed at concerted activities by supervisors at all, but was concerned with an entirely different problem. Its purpose was to prevent a union which represents an employer's rank-and-file 'employees' from attempting to influence or control the employer's labor relations policies by influencing or controlling the selection of the personnel who make or implement such policies . . ." (Pet. 13). Reciting remarks made by Senator Taft during the 1947 legislative debate over Section 8(b)(1)(B), Petitioner asserts that that provision was never intended to apply to a situation where a labor organization does not represent rank-and-file employees "seeking to influence the employer's collective bargaining or grievance-adjusting policies" (Pet. 14).

This argument was unsuccessfully proffered by the Petitioner in *Marine and Marketing, Westchester Marine* and *Cove Tankers, supra.* In both the *Marine and Marketing* and the *Westchester Marine* cases, *supra,* Petitioner urged this Court to grant its petitions for certiorari by focusing particularly upon this issue of

law. In both cases, this Court denied review of the lower courts' rulings on that question. Moreover, in *Cove Tankers, supra,* Judge Bazelon of the Court of Appeals for the District of Columbia Circuit joined his colleagues in sustaining the Board's finding of a Section 8(b)(1)(B) violation although, as Petitioner points out (Pet. 15), he initially disagreed with this conclusion in *Marine and Marketing, supra.*

In view of the apparent unanimity of opinion between the Board and all the reviewing courts on the applicability of Section 8(b)(1)(B) to the kind of conduct engaged in by MMP in the above-described cases, as well as in the instant case, it is respectfully submitted that review by this Court is neither necessary nor warranted.

III.

Petitioner contends that the Court of Appeals' departure from the Board's conclusions of law represents a serious "failure to follow this Court's directives as to the deference owed the Board's interpretation of the Act" (Pet. 17). It should be noted, however, that the Board Decision in this case represents far from a consensus of its members. Rather, it is the opinion of only two of its five members. Indeed, the majority opinion prompted a vigorous dissent by Member Penello, who took particular exception to what he characterized as the majority members' "tortured reasoning," as well as its departure from the Board's (and courts') prior decisions:

> My colleagues say that legislative history shows that Congress intended only to prohibit unions from restraining or coercing employers in the selection or replacement of a particular identified individual or group as an 8(b)(1)(B) representative, and did not mean to prevent unions from pressuring employers in connection with deciding how many such representatives there should be. They

also argue that Board case law is consistent with this reading of the statute.

. . .

Section 8(b)(1)(B) prohibits a union from using restraint or coercion against an employer in the selection of his collective-bargaining representatives or grievance adjusters. An employer's selection of his 8(b)(1)(B) representatives, however, cannot be artificially subdivided into selection of a particular individual or group, which the statute is said to protect, as opposed to the number of such representatives, which is asserted to be left subject to union pressure. For the right to designate a particular individual as a grievance adjuster or collective-bargaining representative carries with it the implicit authority to confine the exercise of 8(b)(1)(B) responsibilities to that person. As an example, an employer may have chosen a certain individual to handle grievance matters for him, because of the employer's confidence in his ability, experience, and trustworthiness, and may, for that reason, desire that this person, and only this person, adjust grievances. Yet, under the majority view, the employer could be forced by a union to increase the number of individuals performing this task, thus insuring that responsibility for adjustment of grievances would be divided among several people and diluting the authority of the person whom the employer would prefer to handle all his grievances.

. . .

In any event, I am convinced that the actual object of MMP's picketing was the replacement of the ship's officers with MMP members. . . . (Pet. App. 21a-23a).

The Court of Appeals approached the facts of this case in much the same way as Member Penello: "We think picketing to dilute the authority of an employer to adjust grievances is no less within the proscription of the statute" than picketing to accomplish the replacement of a given employee (Pet. App. 6a). In arriving at

that conclusion, both the Court and the dissenting Board member relied upon the Board's earlier decision in *Laborers' Local 478 (International Builders of Florida)*, 204 NLRB 357 (1973), *enf'd.* 503 F.2d 192 (D.C. Cir. 1974). The facts of that case are accurately described by the Petitioner (Pet. 15, n.7), whose effort to distinguish it from the case at bar exposes the fallacy of its argument:

> In that case, a union struck to force an employer to reinstate a former supervisor (Davis) who had been demoted. The union considered another foreman who had been retained (Wilson) to be racially biased, and wanted Davis to be reinstated either in place of Wilson or as an intermediary between Wilson and the employees. The strike in *Laborers* was thus aimed at "diluting" the authority of Wilson. Nothing of the kind, however, was involved in the present case. MMP did not desire to "dilute" anyone's authority; it merely wanted the employer to employ four mates in order to prevent erosion of MMP's manning standard (*ibid.*).

In the present case, it is clear that the natural and probable consequence of MMP's conduct necessarily would have been to impact adversely upon the performance of grievance-adjustment duties by the single third mate chosen by the employer to serve in that capacity.[7] In these circumstances, MMP's purported motivation is essentially irrelevant. See *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951).

[7] Petitioner suggests that it never insisted that "any additional mate hired by the employer be given grievance-adjusting authority; the employer, if it desired, could have hired an additional mate without giving him such authority" (Pet. 15-16). Thus, the Petitioner would not only like to impose upon Newport an additional third mate, but would also dictate the scope of the authority attendant to that position if it would help preserve its right to picket a ship with which it had a similar dispute. Suffice it to say that aboard the *Achilles, all* deck officers had grievance-adjustment functions among their duties (Pet. 2a, 29a-30a).

In view of the long history of jurisdictional strife between MMP and MEBA, the Court of Appeals properly viewed the facts of this case with the same perspective applied by the Courts of Appeals for the Fifth and District of Columbia Circuits, and acted consistently with virtually every previous Board decision that has addressed this issue. *See, e.g., International Organization of Masters, Mates, and Pilots (Seatrain Lines, Inc.),* 220 NLRB 164 (1975); *Cove Tankers, supra,* and cases cited therein. The Court's decision, which rectifies the sole deviation from precedent demonstrated by the Board majority herein, does not present an issue warranting review by this Court.

Contrary to Petitioner's assertion (Pet. 18), this is not a case in which the Court of Appeals "approached the matter as if it were an original question, and adopted its own interpretation of the statute." To the contrary, the Court's opinion contains a carefully reasoned discussion of Section 8(b)(1)(B), which is grounded in heretofore consistently applied *Board* law. In sum, the Court's opinion here must be read in light of the facts of this particular case and in full consideration of the serious consequences which could flow from the Board's erroneous decision: All MMP would need to do would be to picket every MEBA-represented ship demanding the employment of an unnecessary and unwarranted third mate. By virtue of MMP's affiliation with the International Longshoremen's Association, this will bring the loading or unloading of the vessel to a complete halt, thus forcing the ship's owner to accede to MMP's featherbedding demands, if not to replace the crew as well.

As the Court of Appeals properly concluded in this case, "Whether the immediate picketing objective is wholesale replacement of existing personnel or a more subtle attempt to force the employer into a breach of the existing contract with MEBA, the ultimate effect is equally coercive of Newport's right to select its grievance adjusters" (Pet. App. 8a, n.6).

CONCLUSION

The decision of the Court of Appeals, far from constituting a departure from precedent, is in full accord with the decisions of the Fifth and District of Columbia Circuits in similar cases.[8] Thus, there is no conflict among the Circuits warranting Supreme Court review. Neither does the decision of the Court below demonstrate a judicial usurpation of the Board's authority to interpret the Labor Act; the Court simply brought the Board's aberrational decision into line with established Board and Court precedent.

The issue herein is of importance only to MMP, which is seeking some means of gaining a stranglehold upon American shipping in order to impose its outdated and unwarranted manning standards upon unwilling American shippers. This, of course, presents no reason for granting review. Indeed, the National Labor Relations Board itself has accepted the Fourth Circuit's decision herein and is not seeking certiorari.

For the reasons set forth above, we submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EARLE K. SHAWE,
WARREN M. DAVISON,
LESLIE R. STELLMAN,
SHAWE & ROSENTHAL,
Sun Life Building,
Charles Center,
Baltimore, Maryland 21201,
(301) 752-1040,
Counsel for Respondent
Newport Tankers Corporation.

October, 1978

[8] There is no longer even a conflict among the *judges* of the Courts of Appeals. See note 6, *supra*.

Supreme Court, U. S.
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No. 78-211

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PETITIONER

v.

NEWPORT TANKERS CORPORATION and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-211

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PETITIONER

v.

NEWPORT TANKERS CORPORATION and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent Newport Tankers Corporation (the Company) owns the S/T *Achilles,* an American Flag vessel. In December 1975, the Company entered into an agency agreement with O.B.O. Ship Operators, Inc. (OBO) under which OBO was to manage the *Achilles.* OBO then entered into a collective bargaining agreement with District 2, Marine Engineers Beneficial Association-Associated Maritime Officers (MEBA), designating MEBA as the exclusive referral source of officers to serve aboard the *Achilles.* This collective bargaining agreement further provided that the *Achilles* have a minimum complement of four deck officers—a master and three mates (Pet. App. 12a-13a, 26a-28a).

Petitioner International Organization of Masters, Mates and Pilots (MMP) is a longtime rival of MEBA's (Pet. App. 4a-6a). MMP supplied the *Achilles* with its deck officers prior to the OBO-MEBA agreement mentioned above and therefore initiated proceedings under AFL-CIO auspices against MEBA for interfering with an established bargaining relationship (Pet. 9). At an AFL-CIO meeting on April 9, 1976 concerning the MEBA-MMP dispute, MEBA indicated that it had no agreement covering the *Achilles*, despite facts to the contrary (Pet. App. 13a n. 6; Tr. 49-50, 57-58, 72-73, 81, 104-107).[1]

On April 13, 1976, the *Achilles*, manned by its four deck officers, docked at a privately-owned berth in Chesapeake, Virginia, and began to land grain. The next day, several members of the Offshore Division of MMP picketed the vessel with signs that read:

> SS [sic] ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUB-STANDARD WORKING CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE SS [sic] ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY. OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS. [Pet. App. 13a, 28a-29a.]

[1]"Tr." refers to the transcript of the hearing before the Board administrative law judge.

Thereupon, employees of the berth owner (who were represented by the International Longshoremen's Association) refused to load the grain while the picketing continued. Two days later, a United States District Court enjoined further picketing by MMP (Pet. App. 29a).

The Board issued a complaint based on MMP's picketing. At the hearing before a Board administrative law judge, MMP took the position that the substandard conditions referred to on the picket signs consisted of the Company's failure to hire an additional mate. While the *Achilles* was operating with three mates—a practice permitted under the MEBA contract—standard MMP contracts required four. Thus, the asserted purpose of the picketing was to have the Company add another mate of its own choosing to the *Achilles*' complement of deck officers (Pet. App. 29a n. 3, 33a). Nevertheless, the administrative law judge held that such picketing was prohibited by Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) as an attempt to "restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" (Pet. App. 33a-35a).

2. A Board majority, reversing the administrative law judge, dismissed the complaint, finding that MMP's picketing did not violate Section 8(b)(1)(B). The Board agreed with the administrative law judge that the mates possessed grievance adjustment authority (Pet. App. 29a-31a).[2] However, the Board concluded that while Section

[2]Chairman Fanning would also have dismissed the complaint on the ground that "the evidence fails to establish that third mates are authorized as collective-bargaining representatives or grievance adjusters on behalf of the Employer" (Pet. App. 17a n.11).

8(b)(1)(B) "protect[s] an employer from a union which might seek to impose its will on the employer by dictating *whom* it should or should not select as its * * * grievance adjuster", the section does not proscribe conduct, such as that of MMP here, which does

> not diminish in any way the Employer's unfettered right to select the representative of its choice. While concededly the Employer might be forced to hire an additional third mate, the choice as to who that third mate shall be is totally within its discretion and control. There is nothing in the record to indicate that MMP sought to have one of its own members selected as the additional third mate. [Pet. App. 16a.]

Member Penello dissented, agreeing with the administrative law judge that the attempt to force the Company to hire an additional mate was prohibited by Section 8(b)(1)(B) because the effort could force an employer

> to increase the number of individuals performing [the mates'] task[s], thus insuring that responsibility for adjustment of grievances would be divided among several people and diluting the authority of the person whom the employer would prefer to handle all his grievances. [Pet. App. 22a.]

Moreover, Member Penello would have found that "the actual object of MMP's picketing was the replacement of the ship's officers with MMP members" (Pet. App. 23a). In this regard, Member Penello relied upon (1) earlier cases in which the Board had found MMP to be engaged in a sustained effort to replace MEBA officers on ocean vessels with MMP members; (2) the inaccurate statement on MMP's picket signs that there was no contract

covering the second and third mates; and (3) the fact that, contrary to MMP's professed concern over substandard manning on the ship, MMP itself had negotiated contracts providing for only four deck officers (a master and three mates), the complement present on the *Achilles* (Pet. App. 23a-24a).[3]

3. The court of appeals vacated the Board's order dismissing the complaint, primarily on the "dilution of authority" theory advanced by Member Penello and the administrative law judge (Pet. App. 6a-7a). In addition, the court stated that even if it had accepted the Board's interpretation, it agreed with Member Penello that MMP's objective was, in fact, the replacement of the *Achilles'* deck officers with its own members (Pet. App. 7a). Thus, the court found two bases for concluding that MMP had violated Section 8(b)(1)(B) and remanded the case to the Board for issuance of an order consistent with its opinion (Pet. App. 8a).

4. The Board believes that the court of appeals erred in failing to accept the Board's view that Section 8(b)(1)(B) does not prohibit union picketing to increase the number, as opposed to affecting the identity, of an employer's representatives for the purpose of collective bargaining or the adjustment of grievances. The Board's construction of Section 8(b)(1)(B) is reasonable, and the court of appeals' rejection of that construction is contrary to the settled principle that even if the Board's construction of a

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[3]The administrative law judge, having found a violation on the "dilution of authority" theory, did not pass on the contention that MMP actually sought to replace MEBA deck officers with its own members. However, the law judge did note "that such an object [was] indicated by" the same factors later cited by Member Penello (Pet. App. 33a-34a n.7).

statutory section is "not the only tenable one," it will be upheld if it "is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." See *National Labor Relations Board* v. *Local No. 103, International Association of Bridge Workers (Higdon Contracting Company)*, 434 U.S. 335, 341.

However, the court of appeals alternatively based its holding that MMP violated Section 8(b)(1)(B) on the ground that MMP intended to force replacement of the deck officers with its own members. Although the Board believes that the court of appeals erroneously assessed MMP's intent in this regard, such a question is essentially an evidentiary dispute which is not appropriate for review by this Court. See *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951). Accordingly, the Board did not file a petition for a writ of certiorari in this case. Should MMP's petition for certiorari be granted, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel
National Labor Relations Board

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NEWPORT TANKERS CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

MARVIN SCHWARTZ
BURTON M. EPSTEIN
243 Waverly Place
New York, New York 10014

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Petitioner

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY BRIEF

Petitioner desires to make two short comments in reply to the brief in opposition filed by Newport Tankers Corporation and the memorandum filed by the National Labor Relations Board.

1. No clearer demonstration that this is a case of a statute gone haywire could be found than in Newport's brief in opposition. Newport argues, *inter alia*, that the

picketing involved here, if allowed to continue, will enhance petitioner's "featherbedding demands" (Newport Br. 14); and that petitioner "is seeking some means of gaining a stranglehold upon American shipping in order to impose its outdated and unwarranted manning standards upon unwilling American shippers." (*Id.* at 16). By use of this inflammatory rhetoric, Newport seeks to justify the application of Section 8(b)(1)(B) to prohibit the picketing involved here. But that statute is not a universal nostrum; it was designed to achieve a specific and limited purpose. Certainly that purpose was not to prevent "featherbedding." Thus, whether or not petitioner's manning standard can be fairly characterized as "featherbedding" (which petitioner, of course, would deny) is beside the point. The issue here is whether Section 8(b)(1)(B) prohibits peaceful picketing to secure compliance with such a standard. We submit that it does not, but the issue is certainly an important one which should be settled by this Court.

2. The Board's memorandum agrees with petitioner's contention that the Court of Appeals misconstrued the statute and applied an erroneous standard of review. The Board suggests, however, that the case may not be appropriate for certiorari because "the court of appeals alternatively based its holding that MMP violated Section 8(b)(1)(B) on the ground that MMP intended to force replacement of the deck officers with its own members." (NLRB Mem. 6). While there is one sentence (and an accompanying footnote) in the court's opinion (Pet. App. 7a & n.6) which seems to take issue with the Board's finding as to the "actual object" of the picketing, we believe this was mere dictum rather than an alternative holding. Certainly the principal basis of the court's decision, as the Board's memorandum recognizes, was its disagreement with the Board's interpretation of the statute, not its disagreement with the Board's findings of fact. Moreover, the complaint in this case did not even

allege that the object of the picketing was to force replacement of any deck officers. Rather, the complaint, as amended at the hearing, alleged that the picketing was unlawful *only* "in that its object was to force O.B.O. *to add to its complement of licensed deck officers an additional third mate.*" (Emphasis added.) Thus, it was plainly improper for the Court of Appeals (as well as the dissenting Board member) even to suggest that the picketing may have had some other object. The sole issue in this case was the purely legal issue of whether picketing to require the employer "to add to its complement of deck officers an additional third mate" was prohibited by Section 8(b)(1)(B). That issue was squarely decided both by the Board and the Court of Appeals. In view of its importance, and the highly questionable character of the court's decision, the issue should be reviewed by this Court.

CONCLUSION

For the reasons stated above and in the petition, a writ of certiorari should issue to review the judgment of the Court of Appeals.

Respectfully submitted,

MARVIN SCHWARTZ
BURTON M. EPSTEIN
243 Waverly Place
New York, New York 10014

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

Counsel for Petitioner

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